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ABSTRACT

Presenting an historical review of policy re Maine's American Indians, this monograph documents the development of: Indian policy prior to 1965 (treaties and legislation); the initial years of Maine's Department of Indian Affairs (DIA); Indian recognition and the courts; and recognition of Maine's off-reservation Indians. Specifically, this paper asserts that: (1) denial of Federal recognition has prevented Maine Indians from participating in Federal Indian policy, seeking protection via Federal statutes, or utilizing Federal courts as a means to retribution; (2) Maine has not recognized Federal sovereignty and has, by conferring certain rights to Indians, effectively treated them as welfare recipients; (3) a large group of Maine's Indians have not been recognized by either State or Federal government; (4) on initiation of the DIA, the means for strengthening self-determination was established, but lack of proper funding has assured welfare oriented operations; (5) both Indians and State officials look to the Federal Government for the means to increase funds; (6) a recent judicial decision making the Non-Intercourse Act applicable to Maine Indians promises clarification of the Federal obligation; (7) if Indian supervision is transferred to the Bureau of Indian Affairs, Maine should retain its DIA to serve in a liaison capacity. (JC)

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The Historical Precedents and Recent Development Of Maine Indians' Bid for Recognition

An honors paper for the Department of History

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INTRODUCTION

At the time of the first white settlements, the Indians of Maine numbered 25,000 comprising twenty distinct tribes. These tribes were joined in the military and political alliance of the Wabanaki Confederacy and shared a common Algonquin linguistic heritage. For the most part, the tribes maintained friendly relations, respecting each other's territorial and hunting and fishing rights. They were dealt with as self-determining, self-sufficient sovereign nations.[1]

Three hundred and fifty years of white occupany has greatly altered the conditions and life style of Maine's Indians. Today Maine's Indian population is only 3,000. Only the Passamaquoddy and Penobscot tribes of Maine maintain any degree of tribal structure and authority. And only members of these two tribes reside on lands guaranteed to them by formal treaty. Although a number of the Maliseet and Micmac tribes of Maine reside in the State, they are guaranteed no lands and retain none of the characteristics of members of sovereign nations.

The early history of Indian and white relations in Maine reflects the former strength and authority of the Indian tribes. At first, relations were peaceful. Puritan records credit Maine's Indians with aiding the first settlers with gifts of food and fuel. During the period of 1675-

1760 a series of "Indian Wars" broke out, each to be concluded by a treaty of friendship. At the outbreak of the American Revolution, Maine's Indians, long dissatisfied with their treatment by the British, joined the Colonialists. In several treaties of alliance and friendship the Colonial Government promised that the Indians should be "forever viewed as brothers."[2]

After the hostilities of the Revolution had ended, however, the Federal Government abandoned these allies, leaving them to be dealt with by the Commonwealth of Massachusetts and later the State of Maine. Formal treaties, in which the Indians relinquished claims to most of their lands in return for minor compensation and future benefits and protection, were negotiated in 1794 and 1818 by the Commonwealth of Massachusetts with the surviving tribes of Maine. At the time of the Act of Separation (1820), creating the State of Maine, Maine assumed responsibility for the obligations incurred by Massachusetts by these treaties. It was essentially the terms of these treaties which defined the relationship between the State and the Indians.

By these treaties three reservations were set aside to be held in trust for the Indians. The Passamaquoddy tribe was split up into two reservations 50 miles apart, Indian Township near Princeton, Maine and Peter Dana Point reservation. The Penobscot reservation consisted of some 146 islands in the Penobscot River. At present only Indian Island is inhabited by the tribe. No specific provisions were made

for the surviving member of the Micmac and Maliseet tribes of Maine. In addition, the state had continually devised new and changing solutions the the "Indian Problem".

That there is an "Indian Problem" today is well documented. On virtually every scale of measurement--health, income, employment, education--the condition of the Indian people ranks at the bottom. The life expectancy for Indians living on reservations is forty-four years compared to the national life expectancy of seventy-one years. Indian babies have little more than one-half the chance of non-Indian babies of reaching their first birthday.[3] The suicide rate among Indians is 21.8 per 100,000 compared to the national level of 11.3 per 100,000. Census figures for 1973 indicate that the average per capita income of Native Americans is $1,573, well below the poverty level. Unemployment runs between thirty and forty percent on reservations and it is estimated that another 18% are woefully underemployed.[4] And finally, the average amount of schooling for American Indians is only 5.5 years.[5] These figures reflect conditions affecting approximately 827,091 Indians, only .41% of the total U.S. population. Maine's Indian population is an even smaller percentage of the total State population.[6] That the State of Maine and the Country as a whole have not been able to alleviate these tragic condition is evidence of the failure of past Indian policies.

Present aims of Indian policy frequently focus on

increased recognition for Native Americans. It is perhaps in this area of recognition that Maine's Indians have been most disadvantaged. The assumption of exclusive authority for the Indians by the State of Maine has precluded the exercise of supervision or support by the Federal Government. Because, Maine's Indians negotiated treates with the Commonwealth of Massachusetts rather than Federal authorities, they have been classified as federally-unrecognized tribes and therefore, denied Federal Indian services.

In addition, Maine Indians' status of state-recognized tribes has been poorly defined, ignored or violated. The State has consistently failed to recognize and carry out the full responsibilities incurred by treaty with the Indians. Reservation lands have not been respected nor have the rights of reservation Indians. Those Indians residing off the reservations have been denied even the State's limited recognition of their special status and privileges as Indians.

Recognition as a goal of current policy has an additional meaning for the Indians. The recent Pan-Indian Movement has sought recognition of the integrity of Indian culture and the need for increased pride in the Indian heritage. This has brought with it a goal of self-determination and a subsequent emphasis on the Indians own recognition of their capabilites and potentials.

The 1960's and 70's have seen significant changes in the Maine Indians' bid for recognition. If nothing else, the creation of the Department of Indian Affairs in 1965, focused public attention on the Indian issue. Certainly, its creation reflects the national concern for minority groups and the rise of monority consciousness. After years of reading "Sunday Journalism" which described the Indian school children raising their hands "with true admiration" in salute to the flag in a daily pledge of allegience, the discontent of the Indians and their true condition was brought to light. Increased press coverage, the emergence of vocal and often militant Indian leaders and the rise in public sympathy for the American Indians did much to bring Maine's Indian population into view. For years, this small segment of the population had been forgotten.

I. MAINE'S INDIAN POLICY PRIOR TO 1965

If Maine's Indians had been forgotten in the public mind, they had been equally lost within the bureaucracy of Maine's state government. Years of dealing with the Indians on an ad-hoc basis resulted in a treatment of their problems which, if not negligent, was at least inconsistent. Later the shuffling of Indian Affairs within the state bureaucracy had compounded these problems. Departments reluctantly administered the affairs of the Indians while attending to their larger duties of providing services to the total population as well.

For ten years after the Act of Separation (1820) which created the state of Maine, no permanent body within the state structure had responsibility for the Indians. Their problems were dealt with only by committees appointed for the moment in consideration. No long-term Indian policy was developed. Indeed, it probably appeared that none was needed. Relations had been peaceful for some time and there seemed no need to take any action at all.[1] In addition, there were very few surviving Indians to deal with. It is estimated that there were only several hundred Indians within Maine at the time of separation.

At the time, the Federal government had been dealing with the Indians in much the same manner.[2] Official relations

were in the hands of the War Department, which pursued a removal policy backed by a philosophy of nonassimilation. Underlying the policy of pushing the Indians further and further west to "Indian Country" was a firm belief that there was room and resources enough for all in America. Much of the Indians' land at this time was acquired through negotiation and purchase, helped of course by economic and military pressure. Of this persuasive campaign to move the Indians further and further west from the land being claimed by the whites, Alexis de Tocqueville wrote,

> Half convinced and half compelled, they (the Indians) go to inhabit new deserts, where the importunate whites will not let them remain ten years in peace. In this manner do the Americans obtain, at a very low price, whole provinces, which the richest sovereigns of Europe could not purchase.3

The Gold Rush of 1849, however, quickly put an end to any hope that the west could remain "Indian Country." The constant stream of settlers to the west coast presented an immediate threat to the Indians' way of life. New conflicts broke out and new treaties were negotiated. This massive military and diplomatic attempt to remove the Indians as obstacles to the progress of western expansion resulted in, at best, the reservation policy; and more frequently, an extermination policy. Either the stength of the Indian tribes must be destroyed by repeated military assaults or the Indians must be persuaded to remain on specific reservations.

It soon became apparent that the white man's intrusion

into "Indian Territory" had destroyed the viability of the Indians' traditional way of life. The drastic reduction of available game and the confinement of the Indians to small lots of often useless land resulted in extreme hardships for the Indians. Often they had to be issued survival rations by the governemnt. Thus began more than a century of America's treatment of the Indians as welfare recipients. The administration of this kind of a relationship was carried on by the newly-created Bureau of Indian Affairs within the Federal government from this point onwards.

In Maine, however, no separate Bureau of Indian Affairs was created until nearly a century later. From 1830 to 1839 the Executive Council Committee on Indian Affairs performed an advisory role to the Governor. In 1839 this responsibility was shifted to a Joint Standing Committee of the Legislature. This committee consisted of three members of the Executive Council, three members chosen from the Senate, and seven members of the House. The Governor and Council had complete legal charge of the Indians until 1929.[4]

If any consistent Indian policy at all can be said to have emerged during this time, it was one of "civilizing" the Indians. The Governor's report on Indian Affairs in 1852 states:

> The force of habit, traditionary pride, and the example of their elders, the excitements of the chase and the allurements of vicious idleness, but above all the want of capital and the means and

> knowlege of agriculture have thus far proved obstacles too powerful to be overcome by the demands of hunger and nakedness, to permit their native slothfulness to be stimulated to the degree of industry necessary to supply their pressing wants.
>
> The Indians of both tribes, notwithstanding their resources, are to a large extent in a condition bordering upon pauperism, and they must continue so until their habits have been changed and the application of their labor differently directed.[5]

In a later report by the Governor in 1890, it becomes quite clear that any kind of Indian policy focused on assimilating the Indians into the white man's way of life. Education at boarding schools away from the reservation and the influences of the "Indian's way" was seen as a necessary step to insure the assimilation of the Indian into the mainstream of American life.

> The Indian boy, so educated, should only be sent back to his people when the conditions warrant it, and unless these conditions are as favorable to his remaining as they were at the school he left, he should be encouraged to live among the whites. The educated Indian girl is at a greater disadvantage than the educated boy, as she can only be the wife of an Indian. However, the prejudice that exists among whites against the negro does not exist against the Indian, and this should be weighed at its full value in the question of the final disposition of the Indian.[6]

It is also clear that the "civilizing" of the Indians was not to be a matter of choice, nor was it to be a matter in which the Indians had any say. There was no recognition of the integrity of the Indians' own culture. The same report of 1890 continues:

> In all future dealing with the reservation Indians, let them understand that they must become self-sustaining; make them understand this by law; show them the way. Teach the Indians that it pays to be clean, to be industrious, to have but one wife, to have property, to have but one family of children, and teach him to follow the best habits of white people. Show him that it is to his interest to be like other men.
>
> Finally, the changes necessary in the Indian policy to improve the Indian's condition are: enforced education under authority of the nation or the states or territories; enforced labor, by making the reservation Indians work for themselves either as laborers, herders, or farmers, and enforced allotment on proper land, with an allowance for houses, cattle, and horses prior thereto from the proceeds of their surplus lands; in fact, a start in life, especially for the squaws and children, thus securing for them settled homes.[7]

This policy of forced acculturation and the breaking up of the Indian tribes by placing them on alloted land was in fact followed by the Federal government in its dealings with some of the western Indians. The Annual Report of 1872 by the Commissioner of Indians Affairs states that the solution to the Indians' problems lay not in the "systematic gratuities of food and clothing but in helping them over the first rough places on the white man's road and meanwhile supplying such subsistence as is absolutely necessary during the period of initiation and experiment."[8] Emphasis was placed on rigid reformatory discipline. The Indians must practice industry; they must work in order to eat.

The desire to educate and "civilize" the Indians, combined with the dismal failure of the previous isolation and non-assimilation policy, culminated in the Federal government's

Allotment Act of 1887. This act, often referred to as the Dawes Act, provided for the individualizing of Indian land. Each adult male Indian was to be given forty acres and a mule. At the time of allotment, citizenship was to be conferred on the Indian. The intended goal was to allow the government to finally leave the Indian to stand alone. The tribes were to be broken up and the government was to deal directly with individual Indians rather than tribal leaders. At the time, Commissioner Atkins of Indian Affairs stated that the Allotment Act would ultimately dissolve all tribal relations and place each adult Indian upon the broad platform of American citizenship.[9] Theodore Roosevelt commended the Act:

> In my judgement the time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass.[10]

In actuality, the Allotment Act had little significant effect on large portions of the Indian population. Most Indians did not become independent and self-sufficient farmers. A prime factor in the failure of this policy to acheive any widespread effects was the total unpreparedness of the Indians to adapt to this abrupt change and plunge into an alien way of life.

The Snyder Act of 1921 was in part a return to the former emphasis on education for the Indinas. This Act initiated a period of increased responsibility by both the Federal

and State governments for the tribes. The Snyder Act, which is still the major statute allocating funds to the BIA, reconfirmed the Governemnt's promise to provide for the general support and education of the Indians. In 1928 a major government investigation into the administration of Indian Affairs and the Indians' problems produced the Meriam Report. This report contained the foundations of a new attitude and apporach to the Indians, a major part of the American Indian Movment. The Meriam Report suggested that policy be directed so as to build on, rather than destroy, all that is Indian.[11]

The Indian Reorganization of 1934 was seen as a monumental step in the progress towards this newly-stated policy of fostering the integrity of the Indians' own culture. In addition, its stated goal was to provide a degree of self-determination for the Indians. This emphasis on the promotion of tribal identity was a complete reversal of the former pdicy directed by the Allotment Act. The act of 1934 provided for the organization of tribal governments similar to local governments. Tribal government was to be directed by corporate charters. An emphasis was placed on self-rule according to parliamentary procedure and democratic ideals. Communal enterprises were to be stressed as the most efficient and expedient means of economic betterment. Commissioner Collier of the Bureau of Indian Affairs envisioned the new move as an attempt to "create a Utopia where tribal communi-

ties offered a model of communal living for individualist-oriented American society."[12]

The Johnson-O'Mallay Act of the 1930's moved the Federal Government's Indian policy towards a new emphasis on the decentralization of Indian services to a state and local level. A new concept of state and local responsibility for the Indians emerged. The Johnson-O'Mallay Act allowed for Congress to enter into joint contracts with the State for educational and assistance porgrams for the Indians. In many instances the states assumed responsibility for the Indinas on a piecemeal basis. Transfer of responsibility was made on a "mutual readiness" basis. For instance, the states have administered Social Security benefits since 1935. Upkeep of roads on the reservation and soil and moisture conservation programs were moved to the State level.

The excitement over the new policy developed in the 30's waned quickly in the 40's as Congress became more and more dissatisfied with the Indians' slow pace towards self-sufficiency. Beginning in 1950 with the Bosone Resolution, Congress pushed for a rapid termination of the unique relationship between the Indians and the Federal Government. The special trust relationship which by treaty had been guaranteed the Indians was determined to be "not acceptable to our American way of life."[13] The high point of the termination drive came in August of 1953 with the passage of House Concurrent Resolution 108, which called for the gradual terminating of

Federal relationships with nearly a dozen tribes. The years 1954 to 1958 saw ten tribes terminate their trust relationships with the Federal Government by an act of Congress. Four additional terminal acts were passed in 1959 and 1962. Theoretically, individual Indian tribes were to choose termination freely. In practice, decisions by the tribes were often made under pressure or without adequate knowlege of the effects of such a policy. The disastrous effects of the termination policy for the Menominee Indians became a well documented case and did much to shift public opinion away from such policy.

The Menominee Indians of Wisconsin voted for termination after they were informed that they would receive a percapita payment of $1,500 from some ten million dollars of tribal funds on deposit in the Treasury if the members accepted termination.[14] This vote taken by the Menominee tribe is often cited as justification for the termination of the tribe. The vote in favor of the "principle of termination" was 169 to 5--only five percent of the 3,200 Menominee affected by the decision. Later a second vote was taken by the tribe and the results rejected termination, 197-0. It seems clear that termination was not chosen unanimously and freely by the Menominee tribe.[15]

After termination, the Menominee Reservation was set up as a separate county of Wisconsin. Burdened by the cost of supporting a county form of government, and by the cost of

providing services which had previously been funded by the Federal Government, the Menominees were forced to dip into their assets. The MEI (which directs the activities of the county) began a program in which some of the most valuable land would be sold to non-Indian developers. This venture to create a retirement/resort area, Legend Lake, provided 2,000 lots for sale to non-Indians. The venture can be prasied for its expansion of the county's tax base, and yet it must be remembered that the Menominee Indians are thus being forced to generate money for community services by selling their most valuable asset--an asset guaranteed by treaty. Finally, there is the strong possibility that non-Indians will outnumber the Indians in voting power, resulting in a loss of the Indians' control over their destiny.[16]

The conditions for the Menominee tribe worsened after termination. After six years they were working at an annual deficit of $250,000. Unemployment was at a level of fifty percent; the hospitals and schools were closed because they could not meet state standards. And with the loss of privileged hunting and fishing rights, there was widespread famine.[17]

These conditions, and the vocalization of the Indians' new anti-termination sentiments (expressed in the slogan, "Integrity, not Integration"), led to a reappraisal of the termination policy in the 1960's. A spokesman for the Menominee tribe summed up the sentiment against forced assimilation among the Indians:

> Assimilation of the races is a biological and a personal thing; it ought to be left to proceed at its own pace and not be hustled by allotments and divestments of Indian property, nor complete termination of the Federal-Indian relationship.[18]

By the 1960's the Indian Movement was in full swing and such sentiment was echoed throughout the country.

Commissioners of Indian Affairs during the 1960's, Philleo Nash and Robert Bennett supported the Indians in their fight against forced assimilation and termination of their unique status. Both the Kennedy and Johnson adminstrations recognized the failure and injustice of the termination pdicy and emphasized in its place an awareness of Indian culture, freedom of choice and self-determination, and self-help. For the first time a serious effort was made to provide for Indian participation in the planning of Indian programs. This is the philosophy behind President Johnson's Indian Policy speech of 1968.

> We must affirm the right of the first Americans to remain Indians, while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination. We must seek new ways to provide Federal Assistance to Indians--with new emphasis on Indian self-help and with respect for the Indian culture. And we must assure the Indian people that it is our desire and intention that the special relationship between the Indian and his government grow and flourish.[19]

Nixon's Administration followed along the same pattern for development of the Indian potential. A reorganization of the Bureau of Indian Affairs was sought to insure the full

participation of the Indians in matters affecting their lives. In addition, Nixon espoused a philosophy of pluralism in America. Rather than assimilation, the goal became maintenance of the Indians' own culture.

> We must recognize that American society can allow many different cultures to flourish in harmony and we must provide an opportunity for those Indians wishing to do so to lead a useful and prosperous life in an Indian environment.[20]

No matter what the actual effect of such theoretical policy within the Federal Governemnt, progress when it came was often further ahead for Federally-recognized tribes than for the Indians of Maine. In any case, Federal policy had no effect on Maine's Indians because of the repeated refusal of the Federal Governemnt to recognize the existence of any kind of responsibility for the Indians of Maine. (The historical reasons behind the Maine Indians' status as Federally unrecognized tribes and their recent bid for recognition will be discussed at length in a later section of this paper.) This is not to say that Maine's policy and attitudes towards the Indians did notoften follow those of the country as a whole, but rather that Maine's government was often painfully out of touch with the experimentation and failure of some Federal policy and that the Maine Indians themselves were excluded from much of the activity within the American Indian movement.

For instance, Maine has sent a state representative to

the Governor's Interstate Indian Council only once since the group's inception in 1950.[21] This group has often had a leading role in formulating a coherant policy towards the Indians. Also, the Indians of Maine have until recently had little to do with the Indian Movement on a national level. Because of their status as state Indians they have had very little contact with other tribes through large councils or committees formed by the Federal Government. For instance, the National Council on Indian Opportunity created by Executive order in 1968 included eight Indian members chosen nationwide. None, however, represented Federally unrecognized tribes. Thus not only Maine Indians but virtually all other eastern tribes had no voice in the development of national policy. In addition, because Federally recognized tribes often see the bids for Federal recognition from state tribes as cutting into the services provided to them by the Bureau of Indian Affairs and the Federal Indian Health Service, Maine Indians have been excluded from such active Indian groups as the National Tribal Chairmen's Association. This dichotomy has greatly reduced the Maine Indians' participation in the Pan-Indian movement.

Maine's treatment of the Indians therefore has not developed as closely within the national framework as it might have. Instead, it developed in relative isolation of the larger movement.

Although Maine was the first state to create a separate

Department of Indian Affairs within the state bureaucracy, they were painfully slow in comparison with other states in granting their Indians the full rights of citizenship. The Citizenship Act of 1924 conferred citizenship on all American Indians and Native Alaskans. Prior to this, citizenship had been obtained by two-thirds of the Indian population by individual treaties, statutes, naturalization proceedings, or services in World War I.[22] The states moved individually to grant voting privileges to their Indian citizens. Maine, however, was in 1967 the last state in the Union to grant such fundamental rights.

The traditional obstacle in the way of granting the Indians of Maine this right had been a clause in the Constitution of Maine which provided that Indians who were not taxed were not eligible to vote. (Although the Indians did pay sales tax, excise tax, income tax and other state taxes, reservation Indians did not pay property tax on land held in trust for them by the State.)

In 1942 the Proctor Report, while seeking to clarify the responsibility of the State to the Indians, requested an advisory opinion by the Attorney General on the pertinent question of the Indians' right to vote since the Federal Act of 1924. The request was refused by the Attorney General's office.[23] The matter was dropped until 1952 when a report by the Department of Health and Welfare, which was then administering the affairs of the Indians, suggested that the Indians

might be allowed to vote for county, state and national officers. The suggestion was made, however, that they not be able to participate in district elections for the House of Representatives as this might adversely affect white townships near the reservations.[24] The Maine State Constitution was amended in 1954 to remove the clause prohibiting the Indians from voting. However, it was not until 1967--almost half a century after the Citizenship Act of 1924--that the Indians were allowed to vote in district elections as well, thus obtaining full voting privileges.[25]

This confusion as to the rights of the Indian citizens, and reluctance to assume full responsibility for the obligations imposed by various treaties with the Indians, characterized the entire administration of Indian Affairs during the 1900's in Maine. From 1929 to 1931, administering to the Indians' needs was carried out by the Forestry Department. At that time, responsibility was shifted to the Department of Health and Welfare where it remained until the creation of the Department of Indian Affairs in 1965. Reports by both the Department of Health and Welfare and by the Maine Legislative Research Committee confirm the impression that the state had yet to recognize their full responsibility and obligations to the Indians and to articulate a consistent policy.

In 1942 the Maine Legislative Research Committee on Indian Affairs produced the Proctor Report. This was a tho-

roughgoing investigation of Maine's treatment of the Indians since the early 1900's. The report repeatedly seeks to define the state's obligations to the Indians, and yet it is almost frightening in its wording. Always it is phrased in terms of the minimum that Maine owes its Indians. There is no recognition of the original terms of the treaty as binding on the state of Maine. And there is a blindness to Maine's role in contributing to the wretched conditions on the reservations. The following excerpts from the report on the Old Town and Peter Dana Point reservations are telling.

> The whole impression one gets is of slackness, lack of pride or initiative.
>
> The Indians are shiftless, take no care of their houses or their land, and little of themselves.[26]

Nor is there any acknowlegment that the wrongs perpetrated on the Indians by the state should be redressed. In fact, although the report does cite specific cases in which the Indians' Trust Fund has been mismanaged or appropriated for uses which did not benefit the Indians, the question "Do we owe the Indians any money?" is asked with an eye to avoiding the obligation.

> Do we owe the Indian any money?
>
> 1. Should payment be made for three Penobscot islands sold in 1835..... $7,550.00
>
> 2. Should payment be made to Passamaquoddy Trust Fund for damages collected by Joseph Granger in 1878 ..... 2,486.17

3. Should Passamaquoddy Indians be recompensed for loss of St. Croix islands. (Estimated value--1885) 2,000.00

4. Should the Trust Funds be recompensed for probable losses suffered by impounding of bank accounts:
   Penobscot Fund 22,911.04
   Passamaquoddy Fund 1,718.70

5. Should Passamaquoddy Fund be reimbursed for receipts of years 1939 and 1940 which went into General Fund 3,877.12

6. Or should all these be cancelled on basis of the thousands spent on them in excess of treaty obligations?[27] (emphasis mine.)

The suggestion that welfare benefits to the Indians are sufficient compensation for the land taken from them is a touchy one for the Indians. To begin with, such a suggestion totally ignores the existence of formal treaties regulating the treatment of Indians and their lands. In addition, it seems unjust that welfare payments should be counted as compensation unless it can be shown that welfare to the Indians has far exceeded comparable payments to other residents of the state. This is a clear example of the failure of the state to recognize its unique obligations to the Indian.

The financial matters discussed in the 1942 report have yet to be resolved. They are presently the matter of court litigation introduced on behalf of the Indians in Federal court, which will be discussed in a later part of this paper. But it is clear, even in this early report of 1942, that the state's handling of Trust Fund Money and the Indians' land

was dubious.

Trust Funds for both the Passamaquoddy and Penobscot tribes were set up by treaty, by specifics within the Act of Separation and by acts of the legislature. For instance, an entry in the cash books for the State of Maine in October of 1823 indicates that $30,000 was paid to the State by the Commonwealth of Massachusetts as in indemnity for the obligations to the Indians assumed by the state of Maine in the Act of Separation.[28] In addition, state resolves indicate that proceeds from land sales, leasing, and timber rights were to be deposited in accounts held in trust for the Indians. A resolve of 1856 provides that the interest of this fund, at the rate of six percent, "shall be forever appropriated for the benefit" of the Indians. No interest has been paid since 1859.[29] No accurate account can be made of these funds; at one point the interest on these funds was deposited in the General Fund account of the State.[30]

In many cases it can be documented that the State of Maine was negligent in its management and appropriations of these funds. During the 1920's, $10,000 was invested in worthless bonds issued by the City of Eastport. In the 1950's, nearly the entire trust fund of the Passamaquoddy Indians was spent by executive order for new housing on the reservation. Eight thousand dollars was drawn from the trust fund for the building of each house. The houses immediately deteriorated to such an extent that today none of these houses may be

licensed as foster homes under the state's minimum safety and fire requirements.[31] Subsequent assessment of these houses indicates that their actual value was only $2,500.[32]

Similarly it appears that the state has failed to exercise its proper responsibility for land which was to be held in trust for the Indians. The Compact of Separation between Massachusetts and Maine provided for the deeding of 395,000 acres of public land in the new state, to be held in trust by Maine for the support of the Passamaquoddy Indians. The land, however, was quickly sold by Maine to private individuals and the receipts were placed in the General FUnd rather than in the Indian Fund.[33] Similar transgressions were made against the land held for the Penobscot Indians. There is continued documentation that the tribe must agree to sell any lands. This provision was often not complied with. In fact, reports of the land commissioner and the passage of certain resolves indicate that the state either did not recognize this clause or had decided to ignore it. For instance, an 1833 Report of the Land Commissioner appointed to purchase land belonging to the Penobscot tribe suggests that "any time the tribe is having inner difficulties, the state is free to step in and purchase more tribal land, until nothing remains."[34] In fact, in 1831 a large tract of land had been sold to the state. Although compensation to the amount of $50,000 was paid into the Penobscots' Fund, the right of the state to buy this land, given the terms of the treaty which

required the land to be held "in perpetuity for the tribe" is questionable.[35] A resolve of 1836 allowed the governor and executive council to lease or sell all or any part of lands belonging to the Passamaquoddy.[36] Indeed, this resolve continued to influence the state's dealing with the tribe until recently. The Proctor report of 1942 emphasizes that additional money could be found for the Indians by selling off their land at any time.[37]

Perhaps one of the most celebrated cases, although it involves a relatively small sum, where the state of Maine failed to exercise its responsibility as guardian of the Indians' land is the 1878 Granger Case. The original treaty of 1794 between the Passamaquoddy and Massachusetts ceded fifteen islands in the St. Croix River to the tribe. In 1878, Joseph Granger brought suit against the tribe claiming that he had a right to the islands from an inheritance from William Bingham. The case was found for Granger, it having been revealed that Massachusetts had in fact deeded the land to Bingham in 179[illegible]--a year prior to the 1794 treaty. The courts awarded Granger $2,486.17 in damages from the Passamaquoddy Trust Fund.[38] The islands themselves had already been sold by the state in 1855. The proceeds of this sale had never been credited to the Trust Fund. Maine has never sought any compensation from Massachusetts on behalf of the Indians. Such action would have been in order since Massachusetts had in fact used land she did not own as part of the 1794 treaty.

It is simple to conclude that the state has been negligent and unjust in its treatment of the Indians. What is more appalling is that the state, with such obvious reluctance, could ask in 1942, "Do we owe the Indians any money?" in light of the full acknowlegement documented in the very same report of these debts. Repeatedly, the state has narrowly defined its obligations in terms of welfare benefits for the Indians and has suggested that these payments are far in excess of anything required by treaty.

The Department of Health and Welfare's report of 1952 to the Legislative Research Committee on Indian Affairs indicates that the provisional articles of the treaties of 1820 with the Penobscots--food, blankets, broadcloths, powder, shot, chocolate, and tobacco[39]--had an estimated cash value of about $2,000 per year.[40] Thus, the appropriation of between five and ten thousand dollars for the Penobscot Reservation was far in excess of any treaty requirements. At the time of this report, the Health and Welfare Department actively sought a clarification of their role from the Attorney General's office. Since 1933 when responsibility for the Indians had been shifted to the Department of Health and Welfare, the Department had concluded that it had the obligation to educate Indian children and provide for needy Indians. The Department also maintained that these functions should be carried out "in the same manner or as near as possible in the same manner as the functions are performed for white people."[41]

At the time the Indians claimed that the State had a special obligation to their Indian citizens because of existing treaties. In the subsequent study made by the Attorney General's office, the validity of the Department of Heath and Welfare's interpretation of its role was confirmed. However, there was a suggestion that, because of the seeming confusion on this point, the affairs of the Indians might better be adminstered by a separate Division of Indian Affairs.[43] A letter from Commissioner David H. Stevens of the Department of Health and Welfare to the Legislative Reserach Committee, however, stated that there was no unanimity of thinking among the Indians as to whether such a division would be of use. The letter indicated that although a very vocal and aggressive minority group at the Old Town Indian Reservation would be in favor of such a move, the majority of the Indians were satisfied with the present arrangement.[44]

Thus, as early as 1952, the creation of a separate department of Indian Affairs had been suggested as a possible way of dealing with the Indians more effectively. Beginning in the early 1960's, the legislature questioned the propriety of Health and Welfare's holding responsibility for the Indians. Both the 100th and the 101st Legislative sessions saw the introduction of bills which would return this responsibility to the Governor and Council. The first such bill failed to pass. In the 101st Legislature, the matter was assigned to be studied by the Committee. In January of 1965, this committee

submitted a report on the Administration of Indian Affairs. Although not particularly condemning, the report did emphasize that the "State of Maine, for all purposes, is dealing with the Indian today in the same manner in which he dealt with him one hundred and forty-five years ago."[45] The report continues:

> One could not rightfully make any claim as to the mistreatment of the Indian but he has been more or less ignored rather than mistreated.[46]

The report recommended the creation of a separate Department of Indian Affairs as it might effect a change in the relative obscurity of the Indians within the state structure. Once again it was revealed that the Indians themselves did not agree as to the advantages of such a system. The Penobscots were divided on the issue. A strong segment, however, indicated that there was a stigma attached in being administered by a welfare department. The Passamaquoddy Indians appeared to have little if any interest on the question. It has been suggested that the relative lack of strong sentiment among the Passamaquoddy was in part due to their isolation in remote Washington County. The Penobscots, close to Bangor, have in the past been more aware of issues concerning them and have had until recently a greater sophistication in dealing with the complex governmental structure. John Stevens, present Commissioner of Indian Affairs and himself a Passamaquoddy, relates that there has been a traditional conflict

between the tribes, stemming in part from the role each played in the revolution and continuing down through the years for what are probably "not very rational reasons."[47] In addition, the government has often used a "divide and conquer" philosophy in dealing with the tribes, and the effects of this have been apparent until recently. At the time of the committee report, Stevens indicates that the Passamaquoddy tribe would often disagree with the Penobscot tribe out of tradition.

Subsequent to the recommendation contained in the 1965 committee report, that a separate Department of Indian Affairs be created, specific legislation was introduced in the House of February 9 of the year by Representative Cookson of Glenburn. The Minority report on the bill was signed by only one member of the House, Representative Berry of Cape Elizabeth. The Bill, creating a Department of Indian Affairs, passed with relative ease in the House on April 21, and in the Senate on May 25, 1965.[49]

It must be noted that although the creation of such a department did in fact provide for a more public view of the administration of the Indians' affairs, it did not constitute a change in the policy or philosophy affecting the Indians. According to the provisions of the act, the new department merely assumed the tasks previously performed by Health and Welfare. Although the January, 1965, report had indicated a dissatisfaction among the Indians with their treatment and a desire for greater self-control over their affairs, the new

legislation did not include provisions for such changes in policy. For instance, the appointment of the head of the new department did not require tribal approval. Rather, authority for such an appointment was entirely vested in the Governor with the advice and consent of the Executive Council.

> The Department of Indian Affairs shall be under the control and supervision of the Commissioner of Indian Affairs who shall be qualified by experience, training, and demonstrated interest in Indian affairs. The Commissioner shall be appointed by the Governor with the advice and consent of the Council, to serve for a term of four years until his successor shall be appointed and qualified. Any vacancy shall be filled by appointment for a like term. The commissioner shall receive such salary as shall be fixed by the Governor and Council.[50]

It should be remembered that on the national level the 1960's were a period of increased Indian involvement in decisions affecting their affairs. This involvement was late coming to the Indians of Maine.

II. THE FIRST YEARS OF THE DEPARTMENT OF INDIAN AFFAIRS

The first Maine State Commissioner of Indian Affairs, Edward C. Hinckley, was sworn in on November 1, 1965, and assumed financial responsibility for the department on January 3, 1966.[1] Hinckley received his Bachelor's degree in Cultural Anthropology and then went on to receive a Master's degree in Education from Harvard University in 1959. Before coming to Maine as the new department's head, he had worked for 5 years within the Federal Government's Indian programs. Originally he had taught in Bureau of Indian Affairs' schools both on and off the reservation, in Utah, Arizona, and Nevada. He came to Maine at the age of 32, after having served within the Indian Health Service in Health Education and Welfare.[2]

Hinckley then had long had a commitment to the Indians' problems and the needed experience to deal with these problems through a large government bureaucracy. The fact that his administration so rapidly ran into serious trouble is more a factor of the State's naiveté and blindness to the needed policy changes than a reflection of Hinckley's capabilities.

One of the most immediate problems facing Hinckley was the question of staffing the new department. Not only did his own secretarial staff have to be hired, but the two field

posts, one at Old Town and one at Calais, were either vacant or filled by agents who in the past had not performed satisfactorily. At the Old Town reservation, Sadie Mitchell, a Penobscot, acted as Indian agent. The department had had numerous complaints, both from the tribe and state officials that she was not performing her duties fairly. Kinship alliances are so strong within reservation life, that a large segment of the tribe felt that Mitchell's handling of her duties unfairly benefited her family. The post at Calais was vacant due to the death of the former Indian agent.

Hinckley recounts his dismay in finding the State's personnel hiring structure so complex. He had assumed that appointments could be made within a matter of 5 or six weeks. Instead he found that almost 6 months would be needed to fill vacancies on a permanent basis. The most pressing needs were at the Calais office. On a temporary basis this post was filled by Goddard College students and faculty who worked on a rotational basis as they moved through their work semesters. The post was finally filled on a permanent basis by Arnold Davis. In addition, Davis was given the title of Indian Development Specialist.

Davis soon became the central figure in the controversy stemming from Hinckley's stated goals and the actual work being done within the new department. For instance, it appears that there was a large gap between the stated required qualifications for Davis' job and Davis' own qualifications. In looking for someone to fill this post Hinckley

had hoped to find someone with the following qualifications:

> Experience in the field of social service, social science, education and/or government graduate from a 4-year college or university with major course work in sociology, anthropology, behavioral science or education. (Experience of an acceptable type may be substituted for education qualification on a year-for-year basis.)[3]

In comparision with the stated requirements for the job, Davis had a 2-year diploma from Washington County Teachers' College in Machias, had taught Science in public school for 5 years and from 1949-1965 had served as a wildlife aide on Moose=horn Wildlife Preserve in Washington County.[4]

Despite Davis' inadequate formal qualifications for the post, Hinckley was at first pleased with the appointment.. "Davis was an old-time downeaster. He had a wonderful openness and a willingness to speak his mind. If left alone, I think the Indians would have responded well to his honesty."[5]

In fact, Davis did speak his mind. Repeatedly badgered by the more vocal and militant members of the Dana Point Reservation, Davis responded in kind. Through the press it became well known that Davis commonly made such bigoted statements as:

> They're (the Indians) like rats in a barrel as long as they're out there on the reservations, living on welfare.[6]

In addition, Davis opposed much of Hinckley's policy which was supported by many of the Indians. Hinckley stressed

self-determination for the Indians, development of leadership potentials, educational programs and increased appreciation for the Indians' own culture. In response to Hinckley's urgings that the integrity of the reservation lands as a homeland and basis for Indian development be protected, Davis countered that the only solution to the Indians' problems was their removal from the reservation and assimilation into white society.[7] Similarly, Davis wished to take a much stronger line against alcoholism on the reservation. Hinckley's approach to the problem was a broad one of general development and education. Davis would have liked to see specific legislation introduced which would prevent the Indians from buying liquor.[8]

Increased hostilities between Davis and the more vocal and discontented members of the Passamaquoddy tribe did much to undermine the effectiveness of Hinckley's program. The former tribal governor of the Dana Point Reservation, John Stevens, said, "Well, Davis is ruining any chance that Ed Hinckley's department can do much good up here."[9] Stevens went on to accuse Davis of doing no more than administrating a welfare system. This was something quite different from Hinckley's original description of the job.

> This is responsible work involving the development and implementation of a self-help program among the Indians, utilizing casework and administrative skills. The work includes administration of various state and federal community development programs involving public housing, donated commodities, financial assistance and education and training.[10]

A look at the appropriations for the new department reveal that the Department of Indian Affairs was indeed doing no more that administering a welfare system.

From the beginning it appears that if the legislature had expected the new department of Indian Affairs to provide services and implement programs other than those carried on in the past by the Department of Health and Welfare, they expected this to be done without any substantial increase to the department's budget. The remaining funds from Health and Welfare's Indian budget, 128 thousand dollars were transferred to the new department for the remaining six months of 1966's fiscal year. Dean Fisher of Health and Welfare repeatedly warned the new commissioner that Health and Welfare's own Indian budget had been running in the red for several years. However, Health and Welfare had been able to juggle funds from other accounts within the department in such a way that their total budget was balanced.[11] Obviously, Hinckley's small single-appropriation Department of Indian Affairs would not have this flexibility, and it could be anticipated that the department would run into serious fiscal problems even if it only attempted to duplicate Health and Welfare's former services.

During his first year as Commissioner of Indian Affairs, Hinckley did ask for and receive just enough money to maintain a general assistance program similar to that provided

by Health and Welfare. Hinckley's requested appropriations for the biennium beginning in July of 1967, however, included additional funds, $280,000. which were to go for developmental programs and $550,000. which were to be used for the upgrading of facilities on the reservations.[12] (At the time none of the reservations had adequate sewerage systems.)

The budget as recommended by Governor Kenneth Curtis made no provisions for the inclusion of these new services in the deparment's task. In fact the budget recommendation was less than had been given to Health and Welfare in recent years. During the debates over the appropriation for these funds Hinckley voiced his dissatisfaction with the funding of the new department and his frustrations over trying to create a meaningful role for the new department with such meager funding.

> If the idea is to merely continue Health and Welfare service levels, the Indian Affairs Department should never have been created. I'm beginning to feel like the kid that didn't ask to be born.[13]

> Without adequate funding my efforts to solve the multitude of Indian problems roughly parallel a man chipping away at an iceberg with an icepick.[14]

A large portion of the additional funds requested by Hinckley were needed for the implementation of programs aimed at increased self-government for the Indians. For instance, Hinckley felt that adequate payment of tribal governors was essential for the operation of tribal government. Hinckley

commented that the $300 per year appropriated at that time for this use, "Doesn't even cover the phone bill if they're doing their jobs."[15] Two years later, adequate funding for these posts had yet to be appropriated and Hinckley once again emphasized their central importance in the progress of the Indians.

> The crime of the white man in general is the systematic attack on or destruction of the Indians' self-determining abilities. When you destroy authority and responsibility for self-government you destroy the independent soul. It takes a dedicated type of Indian to agree to lead with no power, no authority and no money. We have to make the position of leadership meaningful.[16]

By January of 1968, it appeared that the Department of Indian Affairs had overspent its budget. In the first of several emergency appropriations, $18,000 was transferred from the State's General Fund to compensate for the excess spending. No additional funding for 1968-1969 was provided, however, and the department continued to work with insufficient funds.[17] Accordingly, a drastic reduction in services was implemented by the department in April, 1968.[18] Yet, by December the department had once again overextended their funds. At that time the Legislature was presented with a $50,000 overdraft by the department. This money was appropriated under an Emergency Appropriations Act approved by Governor Curtis and the Executive Council.[19]

In January of 1969, Hinckley submittted his budget for the coming biennium at which time he asked for an additional

$50,000 to maintain adequate health and welfare benefits for the remaining quarter of the fiscal year. He said of his requested budget:

> Three years in the post has taught me that it is not possible for a small department with a fixed single appropriation to maintain current services in the face of rising costs.[20]

It is not surprising, given the past history of deficits in the department and the fiscally conservative nature of the Republican Legislature, that Hinckley's new budget had a difficult time passing the appropriations committee. Debate centered around the legislature's frequent warnings to Hinckley to tighten up and the repeated failure of the department to perform within its appropriated budget. Representative Louis Jalbert of Lewiston called Hinckley's overspending "close to defiance."[21] Those who favored the larger appropriations, especially for the health and welface section of the budget, countered that the added funds were essential for the relief of the Indians. Louis Doyle, a Catholic diocesan welfare official, stated:

> The minimum welfare budget for the Indian Affairs Department would be $275.000. To appropriate the recommended $214,000 will mean there will be Indians-probably old people and young children-who will die.[22]

Testimony continued in support of the increased appropriations citing increased medical costs and rising food costs as prime factors contributing to the inadequacies of former budgets to deal with needed relief on the reservations.

When questioned as to why he did not stop spending when he saw that his department was once again headed for a deficit, Hinckley responded that Governor Curtis had not wanted this done. Recounting this affair, Hinckley says that at one point Curtis asked him, "If you stop spending will people suffer?" When Hinckley affirmed that "yes, people would indeed suffer", he was told to go ahead continuing relief and that Curtis would support requests for additional appropriations.[23]

By March of 1969 it became clear that Hinckley's department would once again need emergency funds in order to complete the fiscal quarter ending in June. An additional $40,000-$50,000 was requested to supplement the insufficient budget appropriated by the 103rd legislature. At the time, there was already widespread discontent within the Legislature over the new department's fiscal management. Senator Richard Berry of Cumberland, as chairman of the appropriations committee, began a thorough investigation of the department's handling of funds, in which he stressed that no overspending was justified no matter how worthy the cause.

> What an example, what a pattern, what a route to follow for other department heads; if you think your cause is just, spend all the money you wish. Well, I don't think this is what the law says.[24]

Following this, Senator Barry introduced an order into the Senate to take legal action against Hinckley for overspending in accordance with a violation of Title 5, Section 1583 of

the Maine Revised Statutes. The title reads:

> No agent or officer of the State or any department or agency thereof, whose duty it is to expend money under an appropriation by the Legislature, shall contract any obligation on behalf of the State in excess of the appropriation. Whoever exceeds in his expenditure said appropriation shall not have any claim for reimbursement. Any such agent or officer who shall violate this section shall beguilty of a misdemeanor and, upon conviction, be fined a sum equal to such excess of appropriation by him expended and imprisoned for no longer than eleven months in the discretion of the court.[25]

Although Barry's action did have support within the Legislature, a number of the members faulted Berry with choosing the wrong department as a focal point for budgetary disputes. Senator Mills of Franklin was particularly upset with the impression that such an action would make on the nation at large.

> Ithink if we are going to go at department heads for overstepping their bounds in the way of appropriations that that is a commendable thing to do, but I kind of shudder at starting with the Indians. I mean, we have got a pretty poor image in regard to our treatment of the Indians over the years, and if we have got to pick a department head and if we have got to pick an area of State government where there is abuse of the moneys that we appropirate, gee, let's look somewhere besides at the Indians if it is possible to do so. Because let's not set ourselves up as people who are ready to clamp down on them again. At leat, that may not be the case, but this is the picture we have got, that is the image we have got with the nation at large, as picking on a very, very small minority tucked down in the corner of the State.[26]

In addition, Mills warned against dragging the Indians into a

bipartisan dispute.

> Let's go into caucus on this in the Republican Party, and in the Democratic Party too, and see if we can't come up with something reasonable, and let's not get ourselves into a political hassle with Republicans against Democrats over a fight over the Indians. Let's try to be rational about it.[27]

The issue of bipartisanship is not to be overlooked. Hinckley was appointed by Republican Governor Reed. At the time of the department's fiscal problems Democrat Kenneth Curtis was in office but the Executive Council and Legislature remained predominantly Republican. Curtis may very well have sacrificed the new department's head in favor of maintaining a workable relationship with the Legislature on the whole.

Curtis' support for the new department's head did indeed waiver as discontent in the Legislature grew. Although Curtis repeatedly affirmed that he did not believe that there was any evidence of wrongdoing within the department, he did state that he was "ashamed of" the administration of the Indian Affairs Department and would take "dramatic action" totighten the budget.[28] In addition, in March he told reporters that he was "seriously considering accepting Hinckley's resignation."[29]

In January of 1969, when it first appeared that the department would run into financial trouble once again, Hinckley submitted an offer of resignation to Curtis. In doing so, Hinckley had said, "If the price of getting the extra money means my job, then that's the way it's got to be."[30] In response to this offer, Curtis had said that he was not

about to replace anyone just because they had a deficit. However, he acknowledged that the repeated incidents of overspending did reflect unpon his administration.[31] It became apparent that Hinckley's resignation might indeed prove to be the bargaining point needed in order to get the Legislature to appropriate the emergency funds.

Senator Berry, in fact, had offered to drop the charges against Hinckley if the Governor accepted the resignation.[32] Public opinion at the time was mixed. A large segment of the Indians supported Hinckley and made this support known through demonstration at the State House. An Indian spokesman for the Passamaquoddy Tribe called the investigation a "witch hunt to shift the focus away from the Legislature's own bigotry and callousness".[33] Former Governor Stevens of the Passamaquoddy Tribe commended Hinckley as being "the only one in recent memory who has not been an agent or commissioner against the Indians".[34] Continuing, he warned the Governor that Hinckley's firing would be met "with an immediate and serious response by the tribe."[35] Additional support for the Commissioner came from the Catholic Diocese Bureau of Human Relations and segments of the population who submitted petitions to the Governor. Yet, opposition to Hinckley was equally vocal. An editiorial appearing in the Lewiston Daily Sun summed up the feeling of discontent with the new department's administration, "Hinckley's actions have amounted to nothing more than starry=eyed, open-ended handouts".[36]

On Thursday, March 20th, 1969, Hinckley resigned, saying

that his resignation was "based on the conviction that the position of Commissioner (as it now exists) and my capabilities (whatever they are) don't match".[37] In retrospect, Hinckley adds that he was concerned with removing himself as the center of controversy in order to enable the department to carry on the important business at hand.[38]

In filling the post left vacant by Hinckley's resignation, Governor Curtis appointed Rodney L Scribner, former deputy finance commissioner, to act as commissioner until a permanent replacement could be found. Scribner had been working with Hinckley for several months in an attempt to keep the books balanced. Curtis also came out with a strong statement that he would see that the reservation Indians were adequately provided for.

> I commit myself to seeing that there is no curtailment or interruption of programs on the Indian reservations.[39]
>
> If the legislature ever puts a bill on my desk to hurt this department of Indian Affairs I will veto it and make sure the veto holds.[40]

In addition, Governor Curtis had assured Hinckley upon resigning that he would undertake a nation-wide recruiting effort for a new commissioner and that he would utilize the services of the three tribal governors as members of a screening committee before approving any appointment.[41]

After meeting with the tribal governors, all of whom supported Hinckley and were upset by his resignation, Curtis announced that Hinckley would be retained as an advisor for the department until a permanent replacement had been found.

In reporting this action to the press, Curtis stated that Hinckley's rehiring was done at the insistance of the tribal governors.

For the most part, Hinckley's policies had won approval from the Indians. Consistently he had stressed and executed a policy of increased self-government and self-determination for the tribes. During his administration he had asserted that his department would support no legislative program without prior approval from the tribal governors and councils. In fact, all legislation introduced by the department had to be initiated by the Indians before Hinckley would support it in legislative debates.[42]

Hinckley's administration also saw the creation of independent Housing Authorities for each of the three reservations. Housing had long been a crucial area of concern for the Indians. At the time of Hinckley's appointment as Commissioner of Indian Affairs, a survey revealed that a majority of the reservation homes were substandard. Only one-third of the homes had flush toilets; 80% of the homes had less than 600 square feet, although the average household size was between five and twelve people.[43] In addition, it was well known that previous housing built by the state out of Trust Fund monies had proven inadequate. Not only were they poorly constructed but the Indians had had very little say in their planning, as they were unable to get Health and Welfare to include Indians on the building planning board. Former tribal Governor Stevens reported that "the only choice we had was on the color of kitchen tile-brown or green".[44] The establishment of Indian

Housing Authorities not only allowed for direct Indian control of the building but also Indian control of housing appropriations. The Indian Housing Authorities could apply directly to the Federal Government for funding and all implementation of housing programs would thereby be under direct Indian control withou interference by the State or supervision of the Department of Indian Affairs.

Further direct involvement of the Indians in their own affairs resulted from obtaining funds for the Passamaquoddy Tribe made possible by the Economic Development Act. At first, the Indians could benefit from these funds only partially, as they were required to participate in the Office of Economic Opportunites programs as administered by the Washington County Community Action Project. Programs administered by this CAP agency were designed to serve the entire community of Washington County and often failed to meet the specific requirements of the tribes. During Hinckley's administration, the Passamaquoddy Tribe was able to create an autonomous CAP agency and thus, apply directly to the Federal Government for funding of specific programs designed by the Indians to meet their special needs. In this way, additional funds were found for the tribe and more essentially, these funds bypassed State control and were administered directly by the Indians.

Similarly, the Penobscot Reservation was able to obtain autonomous recognition as a redevelopment area during Hinckley's administration. In September of 1968, Hinckley requested

that the Old Town Reservation be established as a redevelopment area by the Department of Commerce.[45]

The question of autonomous recognition for the reservations seemed a crucial one for the success of many programs. In the past counties had applied for, and been appropriated, funds on the basis of providing services to the entire area including the reservations. Too often, these programs were not designed to meet the special needs of the Indians. For instance, an alcoholic rehabilitation center in Bangor was funded under the partial pretense that the center would care for the Indians of nearby Old Town Reservation. Later it was found that few Indians utilized this center and the few who did were not treated successfully.[46] Today, it is possible for the reservations to develop their own programs designed to meet their special needs.

Hinckley had also been very supportive when a conflict arose between the Georgia-Pacific Lumber Company, who carried on most of the logging operations in the forested area belonging to the Passamaquoddy Tribe, and the Indians. In 1967, the Georgia-Pacific Company instituted a policy requiring a minimum of high school education for all employees. This ruling virtually excluded the Indians from working for the company. In addition, beginning in 1968, Georgia-Pacific contracted with a Canadian lumber company for the harvesting of 6,500 acres of alienated Passamaquoddy lands. At the time, ownership of this land was being contested in a court case introduced in Massachusetts Suffolk Court. In July of 1968,

forty Passamaquoddy Indians stopped logging operations by a "picnic" demonstration, claiming that ownership of the land had yet to be settled and that the company was cutting trees indiscriminately and thus doing permanent damage to the forest.[47] They asked that all logging operations be conducted by all-Indian crews and that the management of the lands be returned to Indian control. The Georgia-Pacific Company countered that if they were forced off these "alienated" lands they would withdraw from an agreement whereby Georgia-Pacific had helped with cutting on Indian lands by providing machinery and technical assistance. Hinckley called this action "pure-spite" and continued by saying that the Indians had not asked the company to do anything which they could not easily and should do.[48] Hinckley supported the demonstration by the Indians as an important step towards the desired goal of making the Indians managers of their own lands.[49]

At the time, the Portland Press Herald came out with a series of editorials supporting the Indians and Hinckley's stated goals of retaining the Princeton lands as a basis for Indian economic development.

> The Indians at Princeton own at least 10,000 acres of timberland. They have a pretty good case for claiming another 5-10,000. The lands at Princeton should be theirs to manage and harvest. The revenues from the land should be theirs to divide in any way they see fit. At Princeton we have the nearest thing imaginable to a divinely created situation. We have circumstances that can be arranged to give a whole group of people a

> look at new horizons. It is almost like having a chance to turn over a limitless coal mine to an Appalachian community of 10 people and saying, "Here is your industry; we will train you to run it. Bless you, the revenue is yours." How could there possibly be anything more worthy of a state subsidized educational program, state loans for machinery, state provided guidance but not control.[50]

Although negotiation by the Tribe and the Georgia-Pacific Company did not settle the question of ownership of the lands, Georgia-Pacific admitted that there might be a "grain of suspicion that the Company's titles were not valid".[51] The matter of ownership of the land was left for the courts to decide. However, the Tribe, supported by the Department of Indian Affairs and the Georgia-Pacific Company did reach an agreement whereby foresting was to be carried out by the Indians. A training program was to be instituted and funded under the joint supervision of the Company, the Passamaquoddy Community Action Program, and the Maine Employment Security Commission. After successful completion of the training program, the Indians would qualify either as crews or individuals for Company employment. In addition, the Company guaranteed that the "alienated" lots would be reforested at the Company's cost.[52]

The years of Hinckley's administration are also to be remembered as the period of time when the celebrated Passamaquoddy Land Case came to a head, and when the attorney handling this case became a focal point in many of the disputes between the Indians and the State. The Passamaquoddy Land Case, which was introduced in Massachusetts' Suffolk

Superior Court Equity Division in March of 1968, had been a long time in the making. Since the 1836 Resolve, which had permitted the State of Maine to lease or sell parts of the Passamaquoddy lands, a great deal of land had been "alienated" from the Indians. Much of the land had been leased to non-Indians for terms of 999 years. The Georgia-Pacific Company had obtained most of their deeds to Indian lands in this manner. During the late 50's a lot of this disputed land was put up as stakes in a poker game by one of the non-Indian leasers. The lot was "won" by a white motel owner whose own property adjoined the lot. The following day he began setting up stakes around the lot, including with his boundaries the home of an Indian family. In an attempt to stop the expansion of the motel onto this disputed land and to bring the issue to court, the Indians provoked an arrest by confrontation with the motel owner. Following this, the Attorney General's office declared the area neutral and barred further selling of Indian property until the matter had been settled by the courts.[53] Unfortunately, the Indians were unable to obtain legal counsel willing to carry through with the case until 1964, when Don C. Gellers accepted the charge.

Gellers immediately became a central figure in the lives of the Passamaquoddy Indians, involving himself not only in the land case but the tribal and personal affairs of the Indians as well. In the end, his presence on the reservations proved so derisive as to undermine his effectiveness

both as an attorney and a friend of the Passamaquoddy.

Gellers spent four years preparing the Land Case. During that time, he managed to become such a controversial figure within the Tribe that the two reservations were split in their support. Gellers had most of his support at the Peter Dana Point Reservation where the young John Stevens was Tribal Governor. At one time, Gellers was so completely trusted that he often sat in on meetings of the Tribal Council. At the Pleasant Point Reservation, Gellers' support was less obvious, and towards the end he was not even allowed on the reservation.

Much of the controversy surrounding Gellers stemmed from the question of legal retainers required by the attorney for preparation of the case. Originally, Gellers was being funded by private sources, a main contributor being the American Indian Rights Association.[54] In January of 1967, a segment of the Passamaquoddy Tribe, led by John Stevens and prompted by Gellers, attempted to get additional funds for the attorney from their Trust Fund. Release of these funds required the official consent of both the State's governor and Executive Council. At the time, the Governor offered to release $3000 from the Tribe's Trust Fund; $1000 immediately, an additional $1000 when the case was half way through the court proceedings, and a final $1000 when the case was over.[55] Gellers flatly refused the offer saying that $3000. was not enough to properly prepare the case, accusing the State of trying to deny the Tribe adequate legal counsel and finally

scoffing at the possibility of knowing when a court case was half completed.[56] In addition, the State had accused Gellers of "exploiting the Indians for personal gain", to which Gellers replied; "If I experience a great deal more personal gain of this sort, I just may starve!"[57] Hinckley did not support the request to release funds to Gellers, and on this point it appeared to some that the Department of Indian Affairs had sided with the State against the Indians.

In October, 1967, Hinckley made an effort to investigate the funding of Gellers' case and to challenge Gellers' authority to interfere in tribal politics and the Tribe's dealings with the State. In a letter to Les T. Connor, President of the Indian Rights Association, Hinckley demanded the details of Gellers' contract with the Indians and questioned Gellers' involvement with other cases if he was being paid full-time to work on the Passamaquoddy Case. Most importantly, Hinckley attempted to insure that the funding for the attorney went through Indian hands. It had been revealed that the IRA had been directly funding Gellers, giving as a reason that it was impossible to send checks to the Tribe as they had no official treasurer.[58] Recounting the incident, Hinckley emphasized that the paying of Gellers directly by the IRA in effect hamstrung the Passamaquoddy Tribe from seeking alternate legal counsel if they chose to do so. At the time, a portion of the Tribe and Tribal Council were in fact dissatisfied with Gellers' involvement in the case. Tribal Governor John Stevens saw this move by Hinckley as an attempt to "foul up"

the crucial land case.[59] Consequently, a great deal of the trust established between the Tribal Governor and the new department's head was threatened, jeopardizing many of the programs being developed with the Passamaquoddy.[60]

It is difficult to assess at what point Stevens and other members of the Tribe who had supported Gellers became dissatisfied with his handling of the case. Certainly, by the time the Bill of Complaint initiating the suit was introduced in Suffolk Superior Court (March, 1968), Gellers had lost the confidence of many of the Tribe because of the quality of his personal life. Specifically, Gellers was heavily involved in drugs, not only for his own use, but as a means of bringing the Indians back to the Great Spirit. For many white and Indian observers, Gellers' introduction of drugs to the Indians looked to be like "the only form of rape the Indians had not yet suffered at the hands of the white man".[61] In addition, Gellers became involved with the wife of a leading member of the Tribe, causing a great deal of family and kinship strife within tribal affairs. It appears that in the end Gellers had allowed his personal life to seriously interfere with the Land Case. Three days after filing the Bill of Complain with the Massachusetts Court, Gellers was arrested for possession of marijuana.[62]

For almost two years the Passamaquoddy Land Case progressed no further. Gellers' Bill of Complaint was quickly answered by the Massachusetts Attorney General's office, which filed a demurrer on May 3, 1968, asking that the case

be dismissed as the Bill of Complaint had failed to set forth sufficient facts to establish the Commonwealth's wrongdoings.

The Bill of Complaint as filed by Gellers cited twenty-four seperate wrongs in Massachusetts'dealing with the Passamaquoddy Tribe. The suit was brought against Massachusetts rather than Maine because the clause in the Act of Seperation of 1820, which stipulated that Massachusetts' obligations to the Indians would be carried out by the newly-created state only with consent of the Indian tribes, had not been complied with in the case of the Passamaquoddy Tribe. The Passamaquoddy had never released Massachusetts from the original treaty obligations and therefore Massachusetts still had responsibility for the Indians' wellbeing and their lands. In addition, the case sought retribution for lands which were deeded to white owners prior to the signing of a formal treaty in 1794 and then used as part of treaty settlement. (The Granger lands were included in this tract.) The complaint then continued citing wrongs done by Maine and not prevented by Massachusetts after the Act of Seperation. Among the grievances against Maine were the leasing of land to private parties without tribal consent (the land held by Georia-Pacific was obtained in this way), the building of roads on Indian land without conpensation to the Tribe, the flooding of lands by the construction of dams, extensive cutting of timber, and the taking of preventive action against retribution suits filed by the Indians. Finally, the suit asked that the $37,471.03 Trust Fund supposedly set aside for the Indians in 1794 be paid to

the Tribe along with all its accrued and accumulated income. This would amount to several million dollars. Altogether the Gellers' case claimed close to $150 million of damages.[63]

It is difficult to assess just how successful Gellers' case would have been. Certainly at the time it was the greatest hope for the Passamaquoddy Indians. But it appears that Gellers, although originally dedicated to the case, did not represent the Indians responsibly. Not only did the process of filing the complaint drag out for four years, but Gellers apparently was paid the exorbitant sum of $70,000 for the work.[64] Finally the actual strength of the Land Case as prepared by Gellers can be questioned. Attorney Thomas Tureen, who is now representing the Passamaquoddy and had at one point worked as a legal assistant to Gellers, claims that although Gellers had done the necessary research, the actual Bill of Complaint was inadequate. Although most of the grievances cited in the Complaint were justified, Gellers had not substantiated each claim sufficiently.[65] Most importantly, it is generaly agreed that because of Gellers' personal conduct, he was incapable of representing the Passamaquoddies with any degree of credibility.

It is this last point which justifies a discussion of Attorney Don Gellers in a section devoted to the first years of the Department of Indian Affairs. Hinckley's administrative goals were aimed at one thing--recognition for the Indians of Maine. Part of this goal of recognition included the Indians' own realization that something could be done to

change their status. Certainly, Don Gellers, as the first attorney to seriously pursue the Land Case and wrongdoings of Maine through the courts, was a central figure in the Passamaquoddies' realization that retribution and change might be possible. In addition, it might be contended that Gellers' fiery enthusiasm for the Indians' cause brought out and kindled a degree of militancy in segments of the Tribe which might otherwise have been less apparent. These might be termed positive benefits derived from Gellers' association with the Tribe.

On the other hand, Gellers was such a controversial and persuasive element in tribal affairs that he often proved to be an obstacle in the way of the Tribe's unity and ability to govern their own affairs. Former Tribal Governor Stevens admits that Gellers became almost "semi-deified" in the minds of some of the Tribe, to the point that many were blinded to his faults and unable to realistically assess his capabilities as an attorney and his sincerity as a friend.[66] When it became obvious that Gellers' personal conduct was jeopardizing the Land Case, the Tribal Council was reluctant to dismiss Gellers from the case. Gellers' insistence that only he could handle the affairs of the Tribe and his prominence as "the only champion of the Indians' cause" had prevented any others from helping with the case. Although Gellers was forced to hire a Boston attorney,John S. Bottomly, out of the necessity of having local counsel sponsor a case in the Massachusetts courts for an out-of-state attorney, Bottomly was

prevented by Gellers from having any direct contact with the Tribe.[67] Thus, it appeared to some members of the Tribe that if Gellers were dismissed the Land Case could not be pursued. Finally and perhaps most importantly, the Passamaquoddy Tribe had placed a great deal of trust in Gellers and was slow to realize his betrayal of that trust. As John Stevens said;

> He came as a friend. He was the most brilliant man I ever met. And it was difficult to realize that his sickness had come between his aims and his ability to act responsibly for the tribe.[68]

III. RECOGNITION AND THE COURTS

Two years after Gellers' arrest and subsequent dismissal from the Passamaquoddy land case, the Tribe hired Pine Tree Legal Assistance, Inc. to handle the case. After a summer's reseaach, PTLA presented the Indians with several options and the decision was made to pursue the land case but to drop Gellers' approach of attempting to force Massachusetts to sue Maine for breach of the Act of Separation contract. Instead, Pine Tree Legal Assistance adopted the plan of bringing the case directly to Federal court and attempting to force the United States Attorney General to sue Maine on the Indians' behalf, invoking the terms of the Federal Indian Non-Intercourse Act of 1790 as justification for obliging the Federal Government to protect Maine's Indian lands. In addition, it was hoped that such a case would clarify the relationship between the Federal Government and State Indians, challenge the State's paramount jurisdiction over the tribes, and lead the way towards Federal recognition and support of these tribes.[1]

The relationship between the Federal Government and Maine's state Indians is one that has been questioned repeatedly in the past by both state officials and the Indian tribes. Traditionally, the Indians of Maine have been denied recognition from the Federal Government on three premises.

Firstly, they have not at anytime entered into a treaty with the United States. Secondly, they have not been "recognized" by a specific act of Congress. And lastly, Maine's Indians have never had a consistent dealing with the Federal Government.[2]

As early as 1935, Maine had sought Federal services for the tribes within its boundaries in an attempt to alleviate the burden of supporting the Indians out of the state's own meager funds. In a letter dated April 18, 1935, the Commissioner of the Bureau of Indian Affairs replied to a Maine State Legislative request of his Bureau to provide educational, health, and welfare services to Maine's Penobscot and Passamaquoddy tribes. The request was denied, giving a very detailed explanation of the Bureau's jurisdiction over Indian tribes. To begin, the letter emphasized that at the time of the original Massachusetts treaties with the Indians of the Wabanaki Confederacy, the doctrine of "state's rights" was supreme. Because of this, the thirteen original colonies assumed the care of those Indian tribes within their borders.

Continuing, the Commissioner reminded the state that an early Maine court decision had maintained that the Indian residents of that state were not "Indian tribes" within the jurisdiction of the Federal Government. The case of State vs. Newell, 1892, involved a question of the fishing and hunting rights of the Indians. Newell, a Passamaquoddy, had been indicted for hunting on the reservation in violation of

state game laws. Newell claimed immunity from these laws, stating that the rights of hunting were guaranteed by treaty, and that the state had no jurisdiction for interference. The decision held that the present Indian tribes of Maine were not in their political life or in their territorial rights successors of the eastern tribes with whom treaties had been made by both the Crown and the Commonwealth of Massachusetts. Hence, the present Indians of Maine could not claim any privileges or exemptions under these treaties.[3] In the opinion of the court, the Passamaquoddy Tribe had ceased to exist.

> Though these Indians are still spoken of as the "Passamaquoddy Tribe," and perhaps consider themselves a tribe, they have for many years been without a tribal orgnaization in any political sense. They cannot make war or peace, cannot make treaties, cannot make laws; cannot punish crime; cannot administer even civil justice among themselves. . . .They are as completely subject to the state as any other inhabitants can be. They cannot now invoke treaties made centuries ago with Indians whose political organization was in full and acknowleged vigor.[4]

Further, the court held that regardless of the Federal courts ruling protecting the sovereignty of Indian tribes, the state of Maine assumed absolute jurisdiction over the Indians residing within their borders. Thus, the Indians were bound exclusively by all laws of the State.

The Commissioner questioned the state premise of exclusive jurisdiction citing a 1913 case of the United States Supreme Court, State vs. Sandoval, which held that the Indians

of the eastern seaboard were as much subject to the authority of the Federal Government as any others. The decision read in part:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executing usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a foster care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.[5]

The letter continues that, regardless of this decision, the Bureau of Indian Affairs because of an administrative decision has not extended services to tribes without formal treaties with the United States unless a specific act of Congress directs them to assume responsibility for a specified tribe.

Finally and most importantly, the Commissioner's letter closes with an appeal to the state of Maine to "appreciate the real significance of the situation."[6] It is clear that financial considerations have, in fact, determined the refusal of Federal benefits to Maine's Indians.

> It may further be said that the limited appropriations by Congress in behalf of the Indians are woefully insufficient for their present real needs and in the absence of substantially increased appropriations we lack sufficient funds to extend our activities into new fields or in behalf of these remnants of the Indian tribes in our eastern seaboard not heretofore expressly entrusted by Congress to our supervision.[7]

Thus, as early as 1935, the state's exclusive power over the remaining Indians of Maine had been questioned. The true significance of the state's usurpation of power becomes clear when it is realized that too often this power had been directed by a non-recognition of the Indians' special status. Thus, Maine did not recognize any obligation to the tribes, nor the special status of the Indians by treaty, and claimed that Maine's support of the Indians constituted gratuities rather than obligated services. For instance, although the case of Newell vs. State held that the tribes had no exclusive fishing rights by treaty, a state resolve permitted free hunting, trapping and fishing licenses to be issued to any Indian over ten years of age. Similar resolves conferred exclusive trapping rights of muskrat during open season from March 1st to May 1st on the Penobscot tribe; and the lawful hunting of mink, otter, and fisher by members of the Penobscot and Passamaquoddy tribes.[8]

The significance of such subtle maneuvers of the state as the denying of rights by treaty and the granting of these same rights by state resolve cannot be overemphasized. In effect it ruled that the state had no responsibilities toward the tribes but rather that the state, in providing services and conferring special rights upon the tribes, was acting out of munificence. The tribes had no legitimate basis of complaint against the states. Maine's dealing with the Indians has come to reflect this prevalent notion of Indians as mere reci-

pients of charity--enclaves of poverty-ridden citizens bereft of any special status.

A body of state Indian law and legislative history has developed within Maine which differs radically from that developed by the Federal courts and Legislature. Federal courts have developed a body of law which generally respects Indian property rights and the inapplicability of state laws which interfere with self-government. For example, in the United States vs. Santa Fe Pacific Railroad Company, Chief Justice Marshall articulated the idea that although the rights of the government over Indian lands were superior to those of the aborigines in matters dealing with the transfer of land, this principle did not destroy the Indians' claim of occupancy. The decision was based on the European legal notion of title by discovery, which gave title to the discovering government against all other governments or individuals. Title by discovery was no more than the preemptive right to acquire Indian lands.

> The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.[10]

Furthermore, the United States Congress enacted the Non-Intercourse Act (1790) specifically to protect the Indians' lands.

The Act reads in part:

> No lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.[11]

In a letter explaining the Act to the Indians, George Washington wrote:

> Here then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.[12]

In contrast to this Federal treatment of "Indian title," Maine has set a precedent by denying the validity of Indian title, assuming absolute power in the selling and leasing of Indian lands, and ignoring the Non-Intercourse Act. In Penobscot Tribe of Indians vs. Veazie (1870), the State courts held that no rights were conferred by original Indian title on the grounds that "a door would be opened to endless litigation, and thousands of titles, now considered perfectly secure, would be instantly destroyed."[13] In addition, Maine's Legislature has enacted resolves governing the management of tribal affairs. In Maine tribal membership, election, eligibility for tribal office, and the management of tribal funds are governed by state resolves. In most instances, Federal

courts have maintained the sovereignty of the tribes to regulate these matters.[14] Finally, as discussed earlier, Maine has assumed paramount authority in the arbitrary leasing and selling of Indian lands. This appears to be in direct violation of the Non-Intercourse Act. It is this last point which Pine Tree Legal Assistance, Inc. hopes to use as a means of forcing the Federal Government to challenge Maine's violation of Passamaquoddy land claims. On February 22, 1972, following the decision to pursue the Passamaquoddy Land Case through the Federal court, Eugene Francis and Archie LaCoote, Tribal Governors of the Passamaquoddy tribe, wrote to Commissioner Louis Bruce of the Bureau of Indian Affairs, requesting that his Bureau recommend that the United States Department of Justice introduce litigation on behalf of the Tribe against the state of Maine.[15] Bruce argued that the Passamaquoddy request was valid but was overruled by his superior at the Department of the Interior, Rogers Morton.[16] Morton contended that because of the Passamaquoddys' status as Federally unrecognized tribes, no trust relationship existed between that tribe and the Federal Government. On June 2, 1972, the Passamquoddy tribe filed suit against Morton et al, requesting a declaratory judgement by the court that the Tribe was entitled to the protection of the Non-Intercourse Act and requesting a preliminary injunction ordering the defendents to file litigation on their behalf prior to July 18, 1972. (The filing of this suit before July 18 was absolutely necessary as

a statute of limitations act would bar this action after that date.) After a preliminary hearing on June 16, 1972, the court ordered the defendents to decide if they would voluntarily file the requested action or show just cause for not doing so.[17] The Department of the Interior's refusal to file suit constituted a summary of past reasons for denying Maine's Indians access to Federal recognition.

> As you are aware, no treaty exists between the United States and the Tribe, and, except for isolated and inexplicable instances in the past, this Department, in its trust capacities, has had no dealings with the Tribe. On the contrary, it is the States of Massachusetts and Maine which have acted as trustees for the tribal property for almost 200 years. This relationship between the Tribe and the States has apparently never been questioned by the Tribe until recently.
>
> The Department has again reviewed its position and has again determined that no request for litigation should be made. The Department does not reach its decision lightly. On the one hand, we are aware that the Tribe may thus be foreclosed from pursuing its claim against the State in the Federal courts. However, as there is no trust relationship between the United States and this tribe, we are led inescapably to conclude that the Tribe's proper legal remedy should be sought elsewhere.[18]

The court ruled that the Department's reasoning was insufficient and ordered the defendents to file suit on the Passamaquoddy's behalf. On June 29, 1972, this order was complied with and civil action no. 1966, United States vs. Maine, was filed in the United States District Court. The case, a $150 million suit, essentially sought retribution for the same transgression as the Passamaquoddy Land Case. At

the time, the Passamaquoddy's counsel, Attorney Thomas Tureen, pointed out that the Penobscot Tribe had a similar claim to Federal Protection. Rather than wait for a second embarrassing order to file suit from the court, the Attorney General's office decided to initiate a similar suit, Civil Action No. 1969, on behalf of the Penobscot.[19] Both suits were held in abeyance until the courts had issued a declaratory statement of the Federal Governments relationship with Maine's Indian tribes.

A final decision on the case, Passamaquoddy Tribe vs. Rogers C. B. Morton, was filed on January 20, 1975, by United States District Court Judge Edward T. Gignoux. The case was held for the Plaintiffs. The Federal Government could not deny the Tribe its request for litigation on the sole ground that there was no trust relationship between the United States and the Tribe. Judge Gignoux's reasoning in the case is based on a broad interpretation that the Non-Intercourse Act applies to all Indian tribes and thereby establishes a trust relationship between all tribes and the government.[20] Judge Gignoux reached the following conclusion:

> The provisions of the Non-Intercourse Act prohibiting dealings in Indian land without the consent of the United States have remained essentially unchanged since passage of the first Act of 1790. The statute in effect in 1794, when Massachusetts negotiated its treaty with the Passamaquoddy, applied to land transactions with "any Indians or nation or tribe of Indians within the United States. . . The words employed in the statute are clear and unambiguous; the prohibition against dealings in Indian land

> without the consent of the United States is applicable to any tribe of Indians. . . The Court holds that the Non-Intercourse Act is to be construed as its plain meaning dictates and applies to the Passamaquoddy Indian Tribe.[21]

Judge Gignoux's decision sets far-reaching precedents for the Indians who have previously been denied Federal recognition and services because of the state's assumption of ultimate authority over Indian affairs. Not only does the decision force the government into official recognition of the Tribes, thus an avenue through the Federal courts for the rectification of wrongs done by Massachusetts and Maine, but it paves the way for the extension of all Federal services to state Indians.

As discussed earlier, this has long been a desired goal of many state officials and Indians alike. During the 1960's, officials in Maine began an active campaign to insure the future recognition and service of Maine Indians by the Federal government. In 1969, Governor Curtis requested that Pres. Nixon take the necessary steps to abolish the distinction between State and Federal Indians.

> Too many Federal programs have focused only on the needs of Indians who are subject to Federal jurisdiction. They have ignored the equally compelling needs of some 100,000 Indians in 22 states who, simply through historical accident, have always been subject to state jurisdiction.[22]

Similar requests have been issued by Maine's representatives to Congress in recent years. In April of 1969, Senator

Muskie introduced Senate Bill 1460. This bill would make funds now appropriated under the Johnson-O'Mallay Act and Snyder Act exclusively to Federally-recognized tribes, available to the 27,000 Indians who have by "historical accident" previously been denied these funds.[23] All of the Maine delegation supported this action.

In 1974, the Maine Advisory Committee to the United State Commission on Civil Rights investigated the question of Federal services and the Maine Indians. Their report makes clear the financial consideration in extending Federal services to Maine's Indians. According to their estimate, Maine's share of Federal Indian services (provided by the Bureau of Indian Affairs, and the Indian Health Service of the Department of Health, Education, and Welfare) would amount to upwards of $5 million per year. This is five times the amount now appropriated by the State of Maine.[24] In addition, it becomes clear that Maine's Indians might soon lose some of the Federal funds now available to them from offices such as the Office of Economic Opportunity if they do not receive Federal recognition. At present, Maine Indians qualify for EDA programs merely because of their poverty level. Recently, there has been a move by the Federal Government to transfer EDA funds to the BIA. If this should happen, Maine Indians would be prevented from participating in these programs as eligibility for BIA services at present requires Federal recognition.[25]

The issue of Federal recognition, then, has long been a central one in determining the treatment of Maine's Indians. In the past, they have been denied access to Federal services and Federal courts. In general, the treatment of Maine's "Indian problem" has developed in isolation from the larger sphere of Federal policy.

IV. RECOGNITION FOR MAINE'S OFF-RESERVATION INDIANS

For the most part, the previous sections have dealt with Maine's reservation tribes, the Passamaquoddy and the Penobscot, and their slow bid for state and Federal recognition of their full rights and privileges. These two tribes, however, make up only half of Maine's total Indian population. An additional 1,500-2,000 Indians live off the reservations, predominantly in Aroostook County, and as such qualify for no special services from the state other than those available to all other citizens.[1] The majority of these Indians are members of the Maliseet and Micmac tribes, which have no trust lands within the United States. Their reservations are in Canada, and because of this, responsibility has been assumed by that government. It should be noted, however, that these trust lands were designated before the final settlement of the United States/Canada border in 1838. Both tribes argue that they are native North Americans, and that their designation as "Canadian Indians" is another dodge by the government to deny them their rights and privileges.[2]

In 1968, the Association of Aroostook Indians was formed to deal with the special problems of these unrecognized Indians. At its founding, the core administrators, Mr. Battiste (Micmac) and Mr. Polchies (Maliseet), stated that the key

aspiration of the Indians of Aroostook County was to be acknowledged as Indians and recognized as having the special status guaranteed to them by formal treaties.[3] The primary goals of the AAI, unchanged since its creation, were the strengthening of the Indian community across lines of family, tribe, territory, and class; the developing of leadership potential; and the general improving of the standard of living.[4] As means to these ends, the AAI has developed programs in five areas: Housing, Education, Youth Opportunities, Employment, and the establishment of State and Federal recognition for Maine's Micmac and Maliseet Indians.[5]

As its basis for claims that the Micmac and Maliseet tribes are eligible for many of the same benefits and privileges of Maine's recognized tribes, the AAI argues that at the time of treaty-making, all of Maine's tribes were joined in alliance. In fact, the AAI contends, "at the time of the revolution the Passamaquoddy and Maliseets were probably one tribe, whom the French called Etchmin and the Micmacs called Malisisik."[6] There is considerable confusion as to the real ethnography of the tribes, but it can be documented that all of the tribes of the Wabanaki Confederacy enjoyed a great deal of intertribal social and political cohesiveness. John Allen, Indian Agent during the Revolution, reported that, "there is no distinction to be made between the various tribes." The Confederacy which maintained a comprehensive set of laws designed to insure cohesiveness existed until the

middle of the nineteenth century.[7]

In addition, there is evidence that representatives from both the Maliseet and Micmac tribes were present at the negotiation of treaties between the Passamaquoddy and the Commonwealth of Massachusetts. The Report of the Treaty Commission states,

> On September 23, 1794, final negotiation began in the vicinity of Passamaquoddy Bay. The Indians assembled to the number of forty, comprehending principle characters of the Mallisheets, Passamaquoddy, and Micmac tribes.[8]

The Treaty of 1794 records the parties to the agreements as the Commonwealth of Massachusetts and "the Passamaquoddy and all those connected with them." The AAI contends that that phrase "incontrovertably" includes Micmacs and Maliseets.[9] One possible explanation for the exclusion of the tribes from specific mention in the treaties has been suggested by Commissioner of Indian Affairs, John Stevens. Maine's Indian tribes had been of immeasurable aid to the colonists during the Revolution. The Maliseets and Micmacs, who were living in territory still occupied by British forces, may have feared reprisals and therefore felt it advantageous to remain more obscure in the negotiations with the colonists.[10]

Arguments such as those above have led the AAI to define five rights of the Maliseet and Micmac Indians living off reservations in Maine:

1. The right to come into the U.S. from Canada and to acquire employment without having to register as an alien.

2. Full hunting and fishing rights in proportion with other Indians in Maine.

3. The right to settle in either Passamaquoddy Reservation provided the Tribal Council grants permission, and thereafter to recieve all services due a member of that community.

4. Full services in proportion with other off-reservation Indians when living off reservations.

5. Full rights of citizenship as guarenteed to all.[11]

This first right of unrestricted travel between Canada and the United States is guaranteed by the Jay Treaty of 1794 between the U.S. and Britain. The exact application of these terms, however, has been ambiguous and inconsistant. For instance, although Indians crossing the border to work in the U.S. need not apply for alien work permits, the law is unclear on matters such as citizenship.[12]

"Canadian Indians" may enter the United States in order to work withou being hired as bonded workers; this is an important factor in producing the deplorable working conditions endured by migrant Indians during the potato and blueberry harvesting. Maine Department of Labor figures indicate that close to a thousand Indians migrate from Canadian reserves for the harvest season. Cne-half the work force for the blueberry harvest is Indian.[13] Conditions for all migrant farm workers in Maine are deplorable but those of

bonded workers (mostly French-Candians) are at least under the supervision of the Federal government; and most will agree that this resulted in considerably better conditions for these workers. Although the terms of the Department of Labor's regulations concerning conditions for foreign workers are not always strictly adhered to, there is at least legal recourse available for these workers. Because Indian migrant workers are classified as domestic labor, these Federal regulations do not apply.[14] In fact, these migrant Indian workers are protected by neither State or Federal regulations, nor are they eligible for Indian services.

> Most important, migrant Indians have either been expressly excluded or written out in acutal practices, from all conventional citizen and workers benefits enacted by Federal and State law, including unemployment insurance, social security, workmen's compensation, wage payment and collection laws, and others. Residence requirements bar them from participation in the political process; and likewise exclude migrants from receiving desperately needed help from public assistance programs, including welfare and food substance allowance.[15]

A report from the Pine Tree Legal Assistance suggests that the Federal regulations protecting foreign workers would, in fact, protect Indian migrant workers if interpreted and applied properly. The regulations prescribe that work must be offered to domestic labor under the same conditions (that is, in compliance with regulations) before jobs can be offered to bonded workers--the underlying philosophy of this regulation being that domestic labor is the

prefered labor. This directive is not being followed. The Indian workers, or "domestic laborers", often must put up with makeshift housing on the same farms where bonded workers are living in Federally-regulated housing. It appears that the law has been unfairly interpreted to exclude Indians from its full protection and benefits.[14]

The Association of Arocstook Indians has recently hired a full-time attorney to aid in developing a legal claim for full recognition of the rights of these off-reservation and migrant Indians. In additon, recognition of the special problems of off-reservation Indians has come from Governor Curtis and the Maine Department cf Indian Affairs. During Curtis' term, the Department of Education created the post of Supervisor of Indian Education. At the urging of Indians, Curtis and the Department of Indian Affairs, the task of Supervisor included the development of new programs designed to meet the needs of all Maine's Indians, regardless of residence in or off the reservations. In recent years, the Department of Indian Affairs has created a special desk for off-reservation Indians. Although at the moment, no funds or services are provided from the desk. The Department does aid off-reservation Indians in obtaining funds available from general sources such as General Assistance and Social Security.[17] Although these moves are an important first step in improving the lot of Maine's off-reservation Indians, they do not constitute recognition that the government's obligations have perhaps been determined by previous

promises and treaties. Nor do they represent full recognition of these Indians as citizens with a special status. For instance the 105th Legislature rejected a bill to allow free fishing and hunting for the Maliseet and Micma Indians. The bill failed primarily because of opposition from the Penobscot Indians who feared that their own hunting and fishing rights might somehow be jeapardized.[18]

The extension of Indian rights and services to formerly unrecognized groups such as off-reservation Indians is not uncommonly opposed by reservation Indians who fear that their own meager services and funds will be consequently reduced. The conflict between off-reservation and reservation Indians is parallel to that of federally unrecognized and recognized tribes. Both groups see the bid for extending services as a serious threat to the survival of their own programs.

V. CONCLUSION

At the beginning of this paper, I stated that the lack of recognition for Maine's Indians has been the single most handicap in their struggle to receive fair and just treatment from the society which now surrounds them. Denied Federal recognition, Maine Indians have been prevented from participating in Federal Indian policy, seeking protection under Federal Statutes or utilizing Federal Courts as a means to retribution. They have also been isolated from the mainstream of governmental, judicial, public and Indian thinking on the problems and policies affecting their lives.

The State of Maine has dealt with the Indians exclusive of all other authority. In effect, they have not recognized the sovereignty of the Federal Government to deal with the tribes nor have they recognized that their authority is limited by formal treaties. The express terms of the treaties have been violated and in place of the services and obligations prescribed by those treaties, the State has "conferred" certain rights on their Indian citizens. This posture has in fact dictated the treatment of Indians as welfare receipients, rather than as the descendants

of self-determining and self-sufficient tribes.

Maine's "Indian problem" has been further compounded by the presence of a large group of Indians who have not been recognized either by the State nor the Federal Government. The problems of off-reservation Indians are as grave as any others. For the most part, these Indians are members of "alienated" tribes. They are currently excluded from most Indian programs because they fail to meet the two eligibility requirements for these services; 1) they do not live on the reservations and 2) they are not members of tribes having trust lands within the Maine borders.

Certainly, the 1960's and early 70's have seen a number of developments towards increased recognition for the Indians of Maine. The Department of Indian Affairs, although poorly funded, has rescued the affairs of the Indians from its previous obscurity in the governmental structure. In addition, the newly created department did vocalize and pursue a policy of self-determination and self-sufficiency for the Indians.

The integrity of tribal governments has been strengthened by the creation of Indian Housing Authorities, School Boards and Community Action Programs. In addition, the appointment of Passamaquoddy, John Stevens, in 1971 as Commissioner of Indian Affairs has given credence to the stated aim of involving the Indians in the planning and

administering of their own affairs.

Yet, today, John Stevens maintains that the Department of Indian Affairs is still essentially a welfare organization. The Legislature continues to fund the Department as such and although the Department recognizes the critical need for development programs, they are unable to fund programs outside of the restricted sphere of welfare. And increasingly, funds for even this limited program are insufficient. Similarly, the desk of Off-Reservation Indians within the Department of Indian Affairs has begun to serve as an advocate for the needs of those Indians previously denied services. But without additional funding little can be accomplished.

Additional funds must be sought elsewhere. Both Indians and State officials look towards Federal recognition as a means of increasing the funds available to Maine's Indians.

It appears that perhaps the most far-reaching change in the recognition of Maine Indians has come from the judicial rather than legislative branch of the government. Judge Edward T. Gignoux's decision that the Non-intercourse Act does apply to Maine Indians will lead to a clarification of the Federal government's obligations to state Indians. Not only may the land transfers of treaties involving the states and their Indians be ruled invalid by this decision, but the supervision of the tribes by the state, may be

replaced by increased supervision and support by the Federal Government.

The effects of this change in the "recognition" status of Maine's Indians are difficult to predict. Certainly, the Federal Government will be able to provide more funds than those provided by the State of Maine. In the field of health services alone, it is estimated that Maine's share of Federal funds would far exceed the amount of funds now provided by Maine. But there is some reservation about tossing supervision for Maine's 3,000 Indians into the huge structure of the Bureau of Indian Affairs which must deal with tribes many times that size. Maine's government has at least the advantage of being more accessible to the Indians than that of the Federal.

Commissioner Stevens hopes that if supervision for Maine's Indians is transferred to the Federal Bureau of Indian Affairs, the state of Maine will still maintain a Department of Indian Affairs. In that way, Maine would be able to act as a liason between the Indian population of that state and the Federal Government. In this manner, Stevens hopes to see the time when the full rights, and heritage of the Indians will be recognized.

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